Court File No: T-1348-12

FEDERAL COURT

BETWEEN:

CONRAD BLACK

Applicant

- and -

THE ADVISORY COUNCIL FOR THE ORDER OF CANADA

Respondent

Application under section 18 of the Federal Courts Act, R.S.C. 1985, c. F-7, as amended.

MEMORANDUM OF FACT AND LAW OF THE APPLICANT
(Application for Judicial Review)

OVERVIEW OF THE APPLICATION

1. This is a unique situation. From the outset the Applicant acknowledged that a conviction in the United States would generally be something that a decision maker in Canada could take some cognizance of in a matter such as this. However, the Applicant has demonstrated that this is not only a situation where there is a real issue that the conviction is not entitled to the normal respect it might otherwise be granted, but has also shown that an oral hearing is the only way he can properly and fairly put his position to the Advisory Council. He has been met with a wall of bureaucratic delay and silence.

2. In June 2011, the Applicant wrote at some length to explain the situation. There was no response whatsoever for 10 months. When the response finally came, it was simply a flat no with no explanation as to how the decision was reached or why. The Applicant sought to avoid proceedings and asked for a reconsideration. He was again rebuffed in the same manner.

3. Finally, in these proceedings, the Applicant has martialled even more evidence to demonstrate the type of conduct he was subjected to in the United States, including cogent letters explaining the situation from third parties. Incredibly the Respondent has not put forward any response on the merits whatsoever. There is no evidence that the Respondent couldn't hold a hearing, why it won't, what material the Respondent has received and proposes to consider (although requested by the Applicant) and no response at all to the logically appealing position of the Applicant that in his unique situation an oral hearing is necessary for him to address the members of the Advisory Council personally. This Honourable Court and the Applicant simply are to be left in the dark. The Respondent instead seeks to rely on the technical position that the Application is premature and that the Applicant must wait until after he is terminated to argue that he should have had an oral hearing on the subject of his termination. Dickensian characterizations from Mr. Bumble spring to mind for that position.

PART I - THE FACTS

A. The Termination Proceeding

4. The Applicant was appointed as an Officer of the Order of Canada in 1990. Appointments of persons as officers of the Order are made for "achievement and merit of a high degree especially service to Canada or to humanity at large."

> Affidavit of Conrad M. Black, sworn July 17, 2012 (the "Black Affidavit"), at para. 3, Application Record, Tab ●, p. ●.
>
> The Constitution of the Order of Canada, s. 16, Black Affidavit, Exhibit " 2", Application Record, Tab ●, p. ●.

5. Paragraph 25(c) of the Constitution of the Order of Canada provides that a person's membership ceases when the Governor General makes an ordinance terminating the person's appointment to the Order. The *Policy and Procedure for Termination of Appointment to the Order of Canada* approved October 28, 2004 (the "Termination Procedure") sets out an 11-stage termination procedure. The Termination Procedure expressly provides for notice to the person whose termination is under consideration and the opportunity to make representations.

Termination Procedure, Stages 5 and 7, Black Affidavit, Exhibit "2", Application Record, Tab B2, p. 24.

6. By letter dated July 20, 2011, Mr. Stephen Wallace, Secretary General of the Order of Canada (the "Secretary General") advised the Applicant that the Advisory Council for the Order of Canada (the "Advisory Council") was considering the status of his appointment to the Order of Canada. The grounds for this consideration was described as:

> The Constitution of the Order of Canada provides for termination of an appointment to the Order. The Policy and Procedure for Termination of Appointment to the Order of Canada requires the Advisory Council to consider termination in certain circumstances, including when a person has been convicted of a criminal offence and when the conduct of the person constitutes a significant departure from generally recognized standards of public behaviour which is seen to undermine the credibility, integrity or relevance of the Order...

Black Affidavit, Exhibit "1", Application Record, Tab B1, p. 17.

7. In that letter, the Applicant was presented with the options of either resigning his appointment to the Order of Canada or making submissions to the Advisory Council.

Black Affidavit, at para. 5, Application Record, Tab B, p. 7.

Black Affidavit Exhibit "1", Application Record, Tab B1, p. 17.

8. The Applicant responded to the Secretary General by way of letter dated August 17, 2011, requesting an oral hearing before the Advisory Council as permitted under the Termination Procedure and confirming that he did not wish to resign from the Order of Canada:

> In my particular circumstance, I do not intend voluntarily to resign and I hereby request a personal hearing before the Advisory Council due to both the nature and complexity of the matters under consideration and the fact that I have been assured of the support of numerous Officers and Companions of the Order of Canada who would also wish to make representations on my behalf. I set out some of the reasons for that complexity and why any termination would be unjust and inappropriate, but necessarily can only scratch the surface of the matters that I will provide to the Advisory Council at a hearing

> in person. It is for this same reason that a personal hearing is necessary.

Black Affidavit, at para., Application Record, Tab B, p. 7.

Black Affidavit, Exhibit "3", Application Record, Tab B3, p. 27.

9. The Applicants' request for an oral hearing was accompanied by submissions as to why an oral hearing was necessary in his circumstances. In sum, the Applicant submitted:

> Let me emphasize that I have always considered my appointment as an officer of the Order of Canada a high honour and that any recipient is obliged to act honourably, and certainly that I have. If I had acted dishonourably in any way, I would voluntarily have tendered my resignation to the Advisory Council. It is because I am confident of the legality and propriety of my actions that I am confident that on their review, the Advisory Council will share that assessment, that I not only do not tender my resignation but seek a hearing in person.

Black Affidavit, Exhibit "1", Application Record, Tab B1, p. 27.

10. The Applicant's request was met with ten months of silence. By letter dated June 7, 2012, the Secretary General advised the Applicant that the Advisory Council would not grant the Applicant an oral hearing as part of its review process. No reasons or basis were provided (nor have any been provided as part of this proceeding) for the decision. Instead, the Secretary General indicated that the Applicant would be permitted to file further written submissions within a limited thirty day timeframe.

Black Affidavit, at para. 7, Application Record, Tabs B, p. 8.

Black Affidavit, Exhibit "4", Application Record, Tab B4, p. 33.

11. The Secretary General also advised the Applicant that the termination of his appointment was under consideration on the basis of certain decisions rendered by the courts in the United States (the "American Proceedings"),[1] which the Applicant had

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[1] According to the June 7, 2012 letter from the Secretary General, consideration of termination "will be based on the following decisions: "*United States of America v. Conrad Black*", November 5, 2007, (2007 U.S. Dist. LEXIS 81777; U.S. District Court for the Northern district of Illinois, Eastern Div.); "*United States of America v. Conrad M. Black*", June 25, 2008, (530 F. 3d 596, 2008 U.S. APP LEXIS 13355; U.S. Court of Appeals, 7th Circuit); "*Conrad M. Black v. United States of America*", June 24, 2010 (130 S. Ct. 2963; Supreme Court of the United States); "*United States of America v. Conrad M.*

indicated in his submissions required further explanation and elaboration.

Black Affidavit, para. 11, Application Record, Tab B, p. 9.

Black Affidavit, Exhibits "3" and "4", Application Record, Tabs B3 and B4, pp. 27-33.

12. Through a letter from counsel dated June 26, 2012 to the Secretary General, the Applicant requested that the Advisory Council reconsider its position and grant the Applicant an oral hearing. The Applicant's request was denied, again without reasons, by letter from the Secretary General dated July 6, 2012.

Black Affidavit, at para. 8, Application Record, Tab B, p. 8.

Black Affidavit, Exhibits "5" and "6", Application Record, Tabs B5 and B6, pp. 8, 36-40.

13. On July 9, 2012 the Applicant commenced this Application for judicial review of the decision of the Advisory Council dated June 7, 2012 and confirmed on July 6, 2012 to deny the Applicant an oral hearing (the "Decision").

B. Nature and Complexity of the Evidence Relevant to the Termination Proceeding

i. The American Proceedings

14. In 2005, the Applicant was charged with 17 criminal offences in the United States. With respect to the allegations against the Applicant, the 17 counts were either not proceeded with (3), abandoned (1), rejected by jurors (9), or their confirmation by the Court of Appeals for the Seventh Circuit was unanimously vacated by the Supreme Court of the United States (4). In the end, the Court of Appeals for the Seventh Circuit, effectively sitting in judgment of itself, confirmed two convictions: one fraud count in relation to improperly accepting through the mails $285,000, even though that money was received only following corporate approval by both the Executive Committee and Board of Directors of Hollinger Inc. ("Hollinger"); and one count of obstruction of justice in relation to the Applicant removing 13 boxes of papers from his office at Hollinger in Toronto.

Black", October 29, 2010, (625 F. 3d 386; U.S. Court of Appeals, 7th Circuit); and "*United States of America v. Conrad M. Black*", June 24, 2011, (Transcript of Proceedings – resentencing before the Honorable Amy J. St. Eve)."

Black Affidavit, at para. 14, Application Record, Tab B, p. 10.

Black Affidavit, Exhibit "13", p. 3, Application Record, Tab B13, p. 64.

15. These two remaining convictions survived only because the U.S. Supreme Court confines itself to questions of law rather than fact. Ultimately, the Court of Appeals confirmed these convictions in the face of severe criticism and vacation of the convictions by the U.S. Supreme Court.

Black Affidavit, at para. 15, Application Record, Tab B, p. 10.

Black Affidavit, Exhibit "3" Application Record, Tab B13, pp. 62-65.

16. The Applicant continues to appeal his two outstanding convictions in the American courts through an appeal based on the U.S. government's violation of his right to counsel guaranteed by the Sixth Amendment.

Black Affidavit, at paras. 16, Application Record, Tab B, p. 11.

17. The Applicant has never been charged or convicted of a criminal offence in Canada.

Black Affidavit, at paras. 12, Application Record, Tab B, p. 9.

18. There is a serious question whether either U.S. conviction could be sustained under Canadian law. The Applicant asserts, as addressed in more than 400 pages in his memoir, that neither was made in accordance with the tenets, norms and values of the Canadian justice system. That he was treated in an unorthodox and unfair manner by the American justice system is supported by others who are familiar with that system, such as former Assistant United States Attorney, Ronald S. Safer, who has provided a letter in support of the Applicant retaining his appointment to the Order.

Black Affidavit, at para. 15, Application Record, Tab B, p. 10.

Black Affidavit, Exhibit "8" (filed separately).

19. The allegations that form the basis of the obstruction of justice charge were brought before the Ontario Court of Justice in a contempt motion. On May 25, 2005, Justice Campbell heard two motions relating to the removal of the 13 boxes. Justice Campbell ordered that the

boxes be returned, but the request for a finding of contempt was deferred. On May 27, 2005, the Applicant's counsel again appeared before Justice Campbell in relation to a number of outstanding motions, including the contempt motion. Consideration of the contempt motion was adjourned to May 31, 2005.

Black Affidavit, at para. 17, Application Record, Tab B, p. 11.

20. On May 31, 2005, Justice Campbell invited the party who had commenced the contempt motion to consider whether or not it wanted to proceed with the motion. The motion was adjourned on the basis that the party bringing the motion would file materials if it intended to proceed and a further scheduling attendance would then be held. More than seven years have passed since that last attendance and no materials have been filed or any further action taken on the contempt motion. Any objective person could only conclude that the motion has been withdrawn or abandoned so that this aspect of the matter has been decided in the Applicant's favour in Canada.

Black Affidavit, at para. 18, Application Record, Tab B, p. 11.

21. Moreover, the Applicant remains adamant that his actions with respect to the boxes were appropriate and intends to present evidence at the oral hearing. The boxes were moved as part of an office relocation with the full knowledge and consent of the acting president of Hollinger, Mr. Donald Vale. The Applicant did not attempt to conceal the removal of the boxes, but rather ensured that he was filmed by the security cameras he had had installed. At the same time and in full compliance with every request made by the court-appointed inspector in Canada, the Applicant produced approximately 112,000 pages of documents in relation to his activities at Hollinger.

Black Affidavit, at paras. 19-20, Application Record, Tab B, pp. 11-12.

Black Affidavit, Exhibit "13", p. 3, Application Record, Tab B13, p. 64.

22. The Applicant's assertions are supported by Mr. Vale, who has sent the Secretary General a letter expressing his support for the Applicant retaining his appointment to the Order of Canada and providing detailed facts in relation to the removal of the boxes. Mr.

Vale's evidence was not provided to the jury that considered the obstructions charge in the U.S. and he notes that he might have taken initiative to ensure that the information he had was presented to the jury, but for the fact that the U.S. prosecutor early in the proceeding made a threat to Mr. Vale that if he was not responsive to him, Mr. Vale would be arrested and detained at the border should he try to enter the United States. Mr. Vale concludes in his letter that "his overwhelming sense of the obstruction count is that a grave injustice has been done by the U.S. Court".

Black Affidavit, Exhibit "9" Application Record, Tab B9, pp. 49-52.

ii. Evidence of Support for Continued Appointment

23. The Applicant has received many unsolicited expressions of support from a number of fellow appointees to the Order. Mr. Robert Fulford, for example, recently wrote a commentary in the National Post entitled "Conrad Black deserves his Order of Canada more than ever".

Black Affidavit, Exhibit "10" Application Record, Tab B10, pp. 54-55.

24. In addition, several of the Applicant's business colleagues with in-depth personal knowledge of the facts that gave rise to the American Proceedings have written letters of support, including Mr. Vale (as noted above) and Mr. Robert J. Metcalfe, an independent director judicially appointed to the Hollinger Board of Directors. The Honorable Dr. Henry A. Kissinger, who served for many years as a director of Hollinger International, has also written to the Chair of the Advisory Council expressing his view that it would be unjust to terminate the Applicant's appointment.

Black Affidavit, para. 23 Application Record, Tab B, pp. 12-13.

Black Affidavit, para. 23 and Exhibits "9", "11" and "12, Application Record, Tabs B9, B11 and B12, pp. 49-52, 57-58 and 60.

25. Mr. Safer, in his letter, outlines his detailed knowledge of the American Proceedings and concludes that "[t]here is no doubt in my mind that Mr. Black is completely innocent". Mr. Safer does not represent the Applicant, but does have intimate knowledge of the facts of the American Proceedings through his representation of another party. As he explains, he

"spent years analyzing every nuance of the facts and law in this case" and concludes there is "no evidence" to support the fraud conviction and that the conviction with respect to the 13 boxes is patently absurd.

> Black Affidavit, Exhibit "13", Application Record, Tab B13, pp. 62-65.

26. It is clear that any questions that the Advisory Council may have in relation to the American Proceedings and these expressions of support are best dealt with at an in-person hearing. None of the foregoing evidence was challenged by the Respondent nor did the Respondent file any of its own evidence.

27. At an oral hearing, the Applicant proposes to present evidence on:

(a) The lengthy and complex history of the American Proceedings to establish the inappropriateness and unfairness of relying on the U.S. convictions in considering the status of his appointment including (i) the process, tactics and seizures employed by the prosecution; (ii) the evidence or lack thereof with respect to the two remaining counts; and (iii) the judicial history of the American Proceedings;

(b) The current status of the American Proceedings;

(c) The removal of the 13 boxes from the Applicant's office at Hollinger, the Ontario proceeding relating to the removal of the boxes and the current status of that proceeding; and

(d) The testimony of others in the Order of Canada.

> Black Affidavit, at para. 29, Application Record, Tab B, p. 14.

28. Moreover, the Applicant seeks an opportunity to answer any questions the Advisory Council may have as well as present evidence on his credibility and character, as well as the impact of his conduct on the credibility and integrity of the Order:

> I believe that my credibility on the matter cannot be judged properly on a paper record, but rather my sincerity and the truth of what I say can only be judged in person. I believe I can appropriately address

these considerations and any questions the Advisory Council may have only if given the opportunity to present my case in person.

Black Affidavit, at para. 21, Application Record, Tab B, p. 12.

PART II - ISSUES

29. The following issues are raised on this Application:

(a) Is the decision of the Advisory Council to deny the Applicant an oral hearing subject to review?

(b) Did the Advisory Council err in denying the Applicant an oral hearing?

PART III - LAW AND ARGUMENT

A. The Decision of the Advisory Council is Subject to Review

30. The Applicant will first address two technical matters that the Respondent has indicated it would be raising in the Application. For the reasons that follow, neither of these positions has merit.

i. The Application is not Premature

31. Although interlocutory decisions are generally not subject to judicial review, they are when special circumstances exist. Thus, interim decisions are subject to review if they define the scope of the ultimate decision, have a final effect on an applicant's rights, engage the jurisdiction of the tribunal, or deny the applicant procedural fairness or natural justice.

Fairmont Hotels Inc. v. Director Corporations Canada, [2007] F.C.J. No. 133 (F.C.) at para. 10, Book of Authorities of the Applicant, Tab 1.

Canada (Minister of Public Safety and Emergency Preparedness) v. Chrichlow, [2007] F.C.J. No. 210 (F.C.) at paras. 35-41, Book of Authorities of the Applicant, Tab 2.

32. In *Canadian Telephone Employees Assn. v. Bell Canada*, in concluding that a decision to deny a motion to amend a complaint was subject to review, this Court outlined some of the circumstances in which interim decisions are reviewable:

> However, regard must be given to decisions where this Court found that interlocutory rulings are reviewable. In *Citizens' Mining Council of Newfoundland and Labrador Inc. v. Canada (Minister of the Environment)*, [1999] F.C.J. No. 273 (F.C.T.D.) MacKay J. held at paragraph 50 that an interlocutory decision is subject to judicial review if it defines the scope of the ultimate decision, and if it is of sufficient significance. In the case at bar, the amendments to the complaints define the scope of the Tribunal hearing and decision. The amendments are of sufficient significance that the applicant need not wait until the decision of the Tribunal to commence judicial review.
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> Tremblay-Lamer J. in *Groupe G. Tremblay Syndics Inc. v. Canada (Superintendent of Bankruptcy)*, [1997] 2 F.C. 719, [1997] F.C.J. No. 294 (F.C.T.D.) (varied at [2001] F.C.J. No. 352 (F.C.A.) but not on this point) which held at paragraph 23 that an interlocutory decision that had a final effect on the applicant's rights is subject to judicial review.
>
> In the present case, the complainants' right to have their full and proper human right complaints heard by the Tribunal are affected by the interlocutory decision. Accordingly, it is my view that this interlocutory ruling affects the final rights of the parties and is subject to judicial review on an immediate basis. [Emphasis added].

Canadian Telephone Employees Assn. v. Bell Canada, [2002] F.C.J. No. 1044 (F.C.) at paras. 21-23, Book of Authorities of the Applicant, Tab 3.

33. Similarly, the Ontario Divisional Court has held:

> [W]here the preliminary decision will likely result in a fundamental failure of justice, the Court may exercise its discretion to hear the application... This Court has stated that it will review an interlocutory decision of a tribunal where a process is fatally flawed. [Citations omitted].

United Food and Commercial Workers International Union v. Rol-Land Farms Ltd., [2008] O.J. No. 682 (Ont. S.C.J.) at para. 43, Book of Authorities of the Applicant, Tab 4.

34. A tribunal's interim decision is also subject to review if the applicant would be left without a suitable remedy if he or she were forced to wait to appeal the tribunal's final judgment.

Parmalat Canada Inc. v. Sysco Corp., [2008] F.C.J. No. 1403 (F.C.) at para. 24, Book of Authorities of the Applicant, Tab 5.

Canada (Minister of Public Safety and Emergency Preparedness) v. Kahlon, [2005] F.C.J. No. 1335 (F.C.) at paras. 14-16, Book of Authorities of the Applicant, Tab 6.

35. As set out at paragraphs 51 to 70 below, the decision of the Advisory Council must be made within the bounds of the duty of fairness and the failure to grant an oral hearing was a breach of that duty. In the circumstances of this case, the Decision is not only one of procedural fairness but one that has a final effect on the Applicant's rights.

36. The denial of an oral hearing clearly impacts whether the Applicant's full and proper representations are before the Advisory Council under a Termination Procedure that mandates the Advisory Council's decision be based on evidence, guided by principles of fairness and made only after the Council has ascertained the relevant facts. As this cannot be fulfilled without an oral hearing, the denial of such a hearing has an immediate and irreversible impact on the final rights of the Applicant.

37. There is a very real possibility that the Applicant will be left without a remedy if this Honourable Court refuses to review the Decision now. Unlike the process of other administrative tribunals, Stage 10 of the Termination Procedure provides that on receiving the report of the Advisory Council, "the Governor General, in accordance with the recommendation of the report, will: (a) request the Secretary General to either advise the person in question that he or she remains in the Order in good standing; or (b) ...make an ordinance terminating the person's appointment to the Order." Accordingly, if the Advisory Council's report provides that the Applicant's appointment ought to be terminated, pursuant to the Termination Procedure the Governor General will terminate the Applicant's appointment without further notice to him. Given that such a termination once finalized through an ordinance has never been subject to judicial review, it is far from clear whether the Applicant will have any remedy at that point. Thus the denial of procedural fairness to the Applicant arising from the Decision, if left standing, is one that cannot later be undone or "corrected".

Canada (Minister of Public Safety and Emergency Preparedness) v. Kahlon, [2005] F.C.J. No. 1335 (F.C.) at para. 14, Book of Authorities of the Applicant, Tab 6.

38. If anything, the Applicant's challenge to the procedure and denial of an oral hearing after the Governor General's ordinance would likely be met with a mootness argument as advanced by the Advisory Council in *Chauvin v. Canada.* In that case, the applicant challenged the procedure followed by the Advisory Council in appointing Dr. Henry Morgentaler to the Order of Canada after he had been appointed. The Court held that once Dr. Morgentaler was appointed to the Order, "any tangible dispute about his investiture [had] disappeared" and the application challenging the procedure for his appointment was therefore moot.

> *Chauvin v. Canada,* [2009] F.C.J. No. 1496 (F.C.) at para. 42, Book of Authorities of the Applicant, Tab 7.

39. There are therefore special circumstances that justify the Court exercising its discretion to review the Decision at this stage. None of the usual reasons for not reviewing interim orders (such as avoiding a multiplicity of proceedings) apply in this case.

ii. The Subject Matter is Subject to Review

40. To be justiciable, an issue is required to be one that is suited to review by a Court. The question is whether the application contains sufficient legal component to permit judicial review, or as put by the Federal Court of Appeal, whether there are objective legal criteria to apply or facts to be determined to decide the question.

> *Chauvin v. Canada,* [2009] F.C.J. No. 1496 (F.C.) at para. 31, Book of Authorities of the Applicant, Tab 7.
>
> *Chiasson v. Canada,* [2003] F.C.J. No. 477 (F.C.A.) at para. 9, Book of Authorities of the Applicant, Tab 8.

41. The issue on this Application is whether the Advisory Council has met the duty of fairness in its consideration of the Applicant's termination pursuant to the Constitution of the Order of Canada and the Termination Procedure. This is clearly an issue that requires a court to apply objective legal criteria to the facts.

42. The issue on the Application also relates to the removal of an honour, which has not been considered by any Court in Canada. It is well established that prerogative acts are

subject to judicial review "where the rights or legitimate expectations of an individual are affected".

> *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.) at para. 51, Book of Authorities of the Applicant, Tab 9.

43. Thus, this Court and the Federal Court of Appeal have refused to strike applications as non-justiciable where the exercise of Crown prerogative to grant an honour was made under a written instrument, and the issue was whether such instrument was followed.

44. In *Chiasson v. Canada,* the applicant sought review of a decision of the Canadian Bravery Decorations Committee for refusing to consider a nomination made by him. Although the Canadian Bravery Regulations did not include a time limit within which nomination must be made following acts of bravery, the Committee had a practice of not considering any nominations that occurred more than two years after the act. The Federal Court of Appeal held:

> ... it is in my view arguable that where a procedure has been established by one public authority, in this case by way of Regulations published in the Canada Gazette, as to how and on what basis a specific Committee, another public body, is to deal with nominations made by any citizen, then a legitimate expectation is thereby created that the prescribed procedure will be followed to screen such nominations prior to the submission of a list of nominees for the exercise by the Governor General of the royal prerogative. (See e.g. Council of Civil Service Unions v. Minister for the Civil Service [1985] 1 A.C. 374 at 417-19 (H. of L.)).

> *Chiasson v. Canada,* [2003] F.C.J. No. 477 (F.C.A.) at para. 9, Book of Authorities of the Applicant, Tab 8.

45. Justice Strayer went on to say:

> It is, in my view, arguable that the royal prerogative having been used to create a body (the Canadian Decorations Advisory Committee) to perform a screening function prior to the exercise by the Governor General of her discretion in the grant of honours, that body is bound by the Regulations creating it and its activities may be subject to judicial review (See, for example, R. v. Criminal Injuries Compensation Board ex parte Lain [1967] 2 Q.B. 864 (Eng. Div. A.)). ... But arguably it could be a recognition that a person who is capable of nominating someone for an award has certain procedural rights to

> the consideration of that nomination by the Committee in accordance with duly adopted Regulations. Even if the Committee's ultimate opinion given to the Governor-General under paragraph 8(e) of the Regulations, and the Governor-General's ultimate choices, are not judicially reviewable, this should not necessarily preclude the Court from reviewing the procedure and criteria followed by the Committee to see if they comply with the Regulations.
>
> *Chiasson v. Canada*, [2003] F.C.J. No. 477 (F.C.A.) at para. 16, Book of Authorities of the Applicant, Tab 8.

46. In *Chauvin v. Canada*, Prothonotary Aalto held that since the Advisory Council operates under a written instrument, a challenge to the Advisory Council's compliance with its own written procedures was not clearly non-justiciable.

> *Chauvin v. Canada*, [2009] F.C.J. No. 1496 (F.C.) at paras. 36-37, Book of Authorities of the Applicant, Tab 7.

47. Accordingly, as the Advisory Council acts under specific written instruments, namely the Constitution of the Order of Canada and the Termination Procedure, the Applicant has a reasonable expectation that the Advisory Council will comply with the procedural fairness principles embedded in the Termination Procedure and, in any event, the Advisory Council is required to make its decision in accordance with the duty of fairness. This clearly meets the test for justiciability.

B. The Advisory Council Erred in Denying the Applicant an Oral Hearing

48. The Advisory Council erred in denying the Applicant an oral hearing because in the circumstances of this case the principles of natural justice and procedural fairness require an oral hearing.

49. The Federal Court is authorized to intervene when an administrative tribunal has failed to observe a principle of natural justice, procedural fairness (which includes a denial of participatory rights) or other procedure that it was required by law to observe:

> The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
>
> (*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or

(*f*) acted in any other way that was contrary to law.

Federal Courts Act, R.S.C. 1985, c. F-7, ss. 2, 18.1(3) and s. 18.1(4)

50. The Advisory Council is a "federal board, commission or other tribunal", which is "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown". Moreover, as the Termination Procedure suggests that the Governor General will follow the recommendation of the Advisory Council, the Council's decision is more than a recommendation, but a decision that directly affects the Applicant and is "inexorably connected" to the Governor General's decision to continue or terminate the Applicant's appointment and is therefore properly subject to review.

Federal Courts Act, R.S.C. 1985, c. F-7, ss. 2, 18.1(1) and s. 18.1(2)

Canada (Attorney General) v. Beyak, [2011] F.C.J. No. 811 (F.C.) at paras. 62-67, Book of Authorities of the Applicant, Tab 10.

i. Standard of Review

51. It is well established that the standard of review analysis does not apply to issues of procedural fairness. They are always reviewed as questions of law and, as such, the applicable standard of review is correctness. If the Court concludes that the conduct of the tribunal has breached natural justice or procedural fairness, no deference is owed and the Court will set aside the decision of the tribunal.

Hidalgo v. Canada (Minister of Citizenship and Immigration), [2011] F.C.J. No. 1636 (F.C.) at para. 11, Book of Authorities of the Applicant, Tab 11.

Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities), [2009] 2 F.C.R. 417 (F.C.) at para. 66 aff'd 2010 FCA 283, Book of Authorities of the Applicant, Tab 12.

ii. Procedural Fairness

52. One requirement of natural justice is that persons affected be heard before they are adversely affected by some decision or action (*audi alteram partem*). The Supreme Court has confirmed that every administrative decision that affects "the rights, privileges or interests of an individual" attracts the duty of fairness:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

Baker v. Canada, [1999] 2 S.C.R. 817 at para. 28, Book of Authorities of the Applicant, Tab 13.

53. In *Baker*, the Supreme Court set forth the following factors to be used in determining the content of the duty of fairness: (i) the nature of the decision and the decision-making process, (ii) the nature of the statutory scheme, (iii) the importance of the decision to the individual affected, (iv) the legitimate expectations of the party challenging the decision and (v) the nature of the deference accorded to the body.

Baker v. Canada, [1999] 2 S.C.R. 817 at paras. 23-27, Book of Authorities of the Applicant, Tab 13.

54. In this case, the removal of an honour is under consideration on the basis of "a person [having] been convicted of a criminal offence and when the conduct of the person constitutes a significant departure from generally recognized standards of public behaviour which is seen to undermine the credibility, integrity or relevance of the Order..." This inquiry engages an interest and/or privilege given that, unlike the granting of an honour, it is based on findings as to the individual's conduct, character and credibility.

55. A consideration of the *Baker* factors in the circumstances of this case favours a higher

degree of procedural fairness in this case.

56. The Termination Procedure itself provides that decisions will be guided by principles of fairness and expressly allows for notice to a person whose termination is under consideration and the ability to make submissions:

> If the person elects to make representations respecting the matter under consideration or any allegation of fact set out in the notice, the person or his or her representative may, within the time prescribed in the notice or as otherwise authorized by the Secretary General, make representations in writing or as the Secretary General may authorize.
>
> Termination Procedure, s. 5, Stage 7, Black Affidavit, Exhibit "2", Application Record, Tab B2, p. 24.

57. In addition, the Termination Procedure requires that the recommendation of the Advisory Council "only be made after the Council has ascertained the relevant facts relating to the case under consideration." The Applicant therefore has a reasonable expectation that the Advisory Council will comply with its own Termination Procedure and, in particular, that it will ascertain the relevant facts before issuing a recommendation to the Governor General. Although the Termination Procedure does not provide that an oral hearing must be held, it does not preclude one either, providing that representations may be written or as otherwise authorized. In this case, the findings and conclusions with respect to the relevant "facts" are in dispute and it is a dispute of the type that requires an oral hearing because the credibility of the Applicant is a central issue.

> Termination Procedure, s. 5, Stage 7, Black Affidavit, Exhibit "2", Application Record, Tab B2, p. 24.

58. Moreover, the Advisory Council's ultimate recommendation will have a serious impact on the Applicant's reputation. As Justice Cory observed in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada - Krever Commission)*, [1997] 3 S.C.R. 440, the duty of fairness is engaged where a person's reputation is at stake:

> For most, a good reputation is their most highly prized attribute. It follows that it is essential that procedural fairness be demonstrated in the hearings of the commission.

Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada - Krever Commission), [1997] 3 S.C.R. 440 at para. 55, Book of Authorities of the Applicant, Tab 14.

59. In *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, this Court concluded that a high degree of procedural fairness was required in the context of the sponsorship commission of inquiry:

> Taking into consideration the factors enunciated in Baker, I find that the applicant was entitled to a high level of procedural fairness before the Commission. Although the nature of the proceedings do not provide for the same level of procedural fairness required in a trial, the potential damage that the findings of the Commission could have on the reputations of the parties involved in the investigation was of such serious consequence that a high degree of fairness was required.

Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities), [2009] 2 F.C.R. 417 (F.C.) at para. 58 aff'd 2010 FCA 283, Book of Authorities of the Applicant, Tab 12.

60. Accordingly, the circumstances of this case require a higher degree of procedural fairness.

iii. Procedural Fairness and Natural Justice Necessitate an Oral Hearing in the Circumstances of this Case

61. Although the duty of procedural fairness does not confer an unqualified right to an oral hearing, each case must be examined on its own facts to determine whether circumstances exist that render written submissions insufficient to discharge the duty of procedural fairness. An oral hearing has been found necessary to procedural fairness where there is conflicting evidence, particularly in relation to a person's credibility, or if a personal assessment of an applicant is in issue.

Carson v. University of Saskatchewan, [2000] S.J. No. 500 (S.C.Q.B.) at para. 51, Book of Authorities of the Applicant, Tab 15.

Khan v. University of Ottawa (1997), 34 O.R. (3d) 535 (C.A.) at paras. 22-23, Book of Authorities of the Applicant, Tab 16.

Rosann Cashin v. Canadian Broadcasting Corporation and Canadian Human Rights Commission, [1984] 2 F.C. 209 (F.C.A.) at p. 5, Book of Authorities of the Applicant, Tab 17.

62. In particular, an oral hearing has been deemed necessary where the credibility of a person goes to the heart of the matter before a tribunal. The Supreme Court of Canada has held, in the context of a *Charter* case that procedural fairness, as a principle of fundamental justice, requires an oral hearing where credibility is at issue:

> In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing.... I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 177 at para. 59, Book of Authorities of the Applicant, Tab 18.

63. Justice Laskin of the Ontario Court of Appeal has also confirmed the applicability of this principle in the non-*Charter* context:

> Many courts in many different settings have emphasized that when a decision turns on credibility, a decision-maker should not make an adverse finding of credibility without affording the affected person an oral hearing.

Khan v. University of Ottawa (1997), 34 O.R. (3d) 535 (C.A.) at para. 22, Book of Authorities of the Applicant, Tab 16.

64. An oral hearing has also been deemed necessary where new and important issues are being argued which will prompt questions on the part of the decision-maker.

Patchett v. Law Society of British Columbia (1979), 101 D.L.R. (3d) 210 (B.C.S.C.) at para. 11, Book of Authorities of the Applicant, Tab 19.

65. In the circumstances of this case, and in particular, taking into account the higher duty of fairness engaged, an oral hearing is warranted. The discretion of the Advisory Council in this case must be exercised in accordance with the principles of fairness. By denying the Applicant an oral hearing, the final recommendation of the Advisory Council will have been made without the Council having been put in a position to fairly ascertain the relevant facts relating to the American Proceedings and the Applicant's conduct and character.

66. The unchallenged evidence is that the history and current status of the American Proceedings, the substantial shortcomings of the United States justice system, and the factual background to the obstruction of justice charge against the Applicant cannot be properly explained and understood in written submissions alone.

Black Affidavit, at paras. 14 - 15, Application Record, Tab B, p. 5.

67. The circumstances are clearly unique. It appears on the record that no appointee to the Order of Canada has ever been terminated on the basis of a conviction in a foreign court of law. Moreover, no appointee to the Order of Canada has ever been terminated after enduring a legal saga remotely comparable to that of the Applicant and there is no evidence that any appointee has sought to address the situation straightforwardly and directly in the manner of the Applicant.

68. The duty of fairness requires that Applicant be able to present his story, address his credibility, and be permitted to answer questions, particularly where there is no disclosure by the Advisory Council of any representations it has or will receive from any third parties or the process it has used already or proposes to use. In *Cashin v. CBC*, the applicant made a human rights complaint after the CBC refused to renew the her contract after her husband was appointed a director of Petro-Canada on the ground that her objectivity as a reporter might be suspect. The Federal Court of Appeal held that although the applicant had the opportunity to tell her own story and had a general notion of the points made against her, she was refused the actual evidence and had no opportunity to controvert specific evidence against her:

> In the circumstances of this case, the requirements of natural justice were not met. I do not see how the applicant could be given a fair opportunity to meet the case against her without being given an opportunity to confront directly particular evidence against her and to test the credibility of its proponents. She must, of course, be exposed to the same test.

Rosann Cashin v. Canadian Broadcasting Corporation and Canadian Human Rights Commission, [1984] 2 F.C. 209 (F.C.A.) at p. 5 (Q.L.), Book of Authorities of the Applicant, Tab 17.

69. No reasons were provided for the Decision. The Applicant was advised 10 months later by the Secretary General that the Advisory Council will not hold an oral hearing. A request for reconsideration of this decision was also denied without reasons. Procedural fairness requires that, in the very least, reasons be provided.

> *Baker v. Canada*, [1999] 2 S.C.R. 817 at para. 43, Book of Authorities of the Applicant, Tab 13.

70. For the foregoing reasons, in the circumstances of this case, only an oral hearing will ensure that the recommendation of the Advisory Council is based on "evidence and guided by principles of fairness" and made after "the Council has ascertained the relevant facts relating to the case under consideration", i.e., made in accordance with the Termination Procedure as well as the required duty of fairness.

PART IV - ORDER REQUESTED

71. For all of the foregoing reasons, the Applicant respectfully requests: (a) a declaration that the Decision is invalid or unlawful, (b) an order setting aside the Decision and (c) an order requiring the Advisory Council to grant the Applicant an oral hearing pursuant to the Termination Procedure.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of August, 2012.

Peter Howard

Peter F.C. Howard

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